FOR ARGUMENT

No. 76-1410

In the Supreme Court of the United States

October Term, 1977

Joseph V. Agosto, petitioner
v.
Immigration and Naturalization Service

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

WADE H. McCREE, JR.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
FRANK H. EASTERBROOK,
Deputy Solicitor General,
MARION L. JETTON,
Assistant to the Solicitor General,
ROBERT J. ERICKSON,
JOHN H. BURNES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

254-059—78——1

In the Supreme Court of the United States

October Term, 1977

No. 76-1410

Joseph V. Agosto, petitioner
v.
Immigration and Naturalization Service

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i–ii) is not reported. The opinion of the Board of Immigration Appeals (Pet. App. iv–xiii) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1977. A petition for rehearing was denied on March 23, 1977 (Pet. App. iii). The petition for a writ of certiorari was filed on April 12, 1977, and granted on October 17, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a genuine issue of material fact exists concerning petitioner's nationality.

STATUTE INVOLVED

Section 106(a) of the Immigration and Nationality Act, as added, 75 Stat. 651, 8 U.S.C. 1105a(a), provides in relevant part:

> The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 *et seq.*) shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—
>
> *   *   *   *   *
>
> (5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28 * * *.

STATEMENT

1. Petitioner entered the United States on or about December 11, 1966 (A. 4). He maintained that he was a citizen and displayed a United States passport. He was admitted without the inspection that would have been accorded someone who was known not to be a citizen. See generally *Reid* v. *Immigration and Naturalization Service,* 420 U.S. 619. He was convicted of a federal felony and, while in prison, was served with an order to show cause why he should not be deported (A. 4-6). The Immigration and Naturalization Service charged that petitioner had entered the United States under a false claim of citizenship, thus escaping inspection as an alien; it later expanded the charge to include the contention that petitioner was deportable because he had been convicted of three crimes involving moral turpitude, two in Italy and one in the United States (A. 21-22).

a. The order to show cause was issued on September 5, 1967. An immigration judge (then called a special inquiry officer) held a hearing at which the Service introduced documentary evidence that petitioner had been born in Italy in 1927. The evidence, later summarized by the special inquiry officer and the Board of Immigration Appeals (see Pet. App. v-vi; A. 9-12, 28-31) showed: (1) an entry in the Registry of Births for the city of Agrigento, Italy, that petitioner was born there on July 17, 1927, and had been sent to a foundling home (R. 355, 428);[1] (2) an entry in the books of the foundling home showing that petitioner was received shortly after birth and was en-

[1] "R." refers to the record in the court of appeals.

trusted to a couple who later "affiliated" him, permitting him to use their surname (R. 671); (3) a record that petitioner was baptized on July 18, 1927, and given the name Vincenzo Di Paola (R. 422). These records showed that petitioner was entrusted to Pietro Pianetti and Crocifissa Porrello Pianetti and lived with them in Licata, Italy; they "affiliated" him in 1943, and he then took their surname (R. 355, 422). Petitioner was married to Anna Vicis Vinci in Licata in 1944 (S.R. 40), and the marriage produced two daughters (S.R. 41–42).[2] Petitioner conceded that all of these documents pertained to him and that he had lived and been married in Italy (Pet. App. vi).

b. Petitioner nevertheless contended that he was a citizen of the United States, and thus not deportable, because he had been born in Cleveland, Ohio, in 1921 (S.R. 34).

Petitioner offered a duplicate of a birth certificate showing that on August 30, 1921, Giuseppe Agosto was born in Cleveland, Ohio, to Carmela Todaro Agosto and Arcangelo Agosto (R. 425–427). He offered Social Security records showing earnings in the United States beginning in 1951 (R. 433); a United States passport in the name of Joseph Agosto (R. 425); and a marriage certificate showing that petitioner, claiming to be age 32 and not previously married, was married in 1953 in Anchorage, Alaska, to Leota Richards (R. 434; see also A. 9, 14–15). These documents showed a birth in 1921, six years before the date in documents petitioner conceded pertained to him, and showed a "first" marriage in the United States by someone who conceded that he had been married before.

[2] "S.R." refers to the supplemental record in the court of appeals.

Petitioner attempted to reconcile the difference in the documentary evidence. He testified that he left Cleveland in 1925 at the age of four or five (S.R. 48, 53, 105) and traveled to Licata, where he lived first with his grandfather Porrello (S.R. 50, 105) and (after Porrello died in 1930) then with his uncle Pianetti (S.R. 106). He testified that the name Vincenzo De Paul was "imposed" on him in 1927 or 1928 (S.R. 50), although he was known earlier by the name Porrello and later as Pianetti (S.R. 50, 64).

Petitioner testified that he had been told that he had two half brothers, one of whom was named Joseph Todaro Agosto (S.R. 34, 53–54), and a half sister, Mary Agosto (S.R. 65). He testified (i) that he did not know who his natural mother was (S.R. 65); (ii) that he had been told his mother was Angela Porrello; and (iii) to his knowledge his mother was Carmela Todaro (S.R. 33, 83–84).

Petitioner also testified (S.R. 92–96, 104) that his belief that he was born in Cleveland on August 30, 1921, was based entirely on the birth certificate, which had been sent to him in Italy between 1948 and 1950 by his uncle Joseph Porrello, who then lived in Kansas City, Missouri. Before then, he asserted, he had no knowledge of birth outside of Italy. He wrote to Joseph Porrello only because Pietro Pianetti told

him in "that year" that he had been born in the United States (S.R. 95–96).

According to petitioner, he left Italy for Canada promptly after receiving the birth certificate. He used an Italian passport and traveled as Vincenzo Pianetti; he admitted that he never sought a United States passport because he believed that "Joseph Agosto" had lost his United States citizenship (S.R. 68).[3] He stated that he stayed in Canada two or three months in 1950 and went to Mexico (S.R. 107–108). He entered the United States from Mexico three times using the birth certificate of Giuseppe Agosto that Jospeh Porrello had sent him; he settled in Kansas City in early 1951 (S.R. 108–111). Petitioner then used the birth certificate to obtain a United States Citizen Card in 1954 and a United States passport in 1956 (S.R. 111). Petitioner testified he never used the name Joseph Agosto or Giuseppe Agosto before coming to the United States; he has consistently used the name, however, in the United States (S.R. 90).

c. The Service presented evidence that undermined petitioner's account of his origins. The Italian documents already described explained everything except the 1921 birth certificate of Joseph Agosto. Other evidence showed that the 1921 birth certificate—which was, according to petitioner, the sole basis of his belief that he is a United States citizen (S.R. 104)—pertained to a Joseph Agosto who died in 1951 in Licata, Italy.

[3] Although petitioner did not produce his Italian passport for the record, Canadian records show that he arrived using the name Vincent Pianetti, at Montreal Airport, November 23, 1951, giving an age of 24, a birthplace of Licata, Italy, and the occupation of "industrial lawyer" (R. 476).

The evidence concerning the Joseph Agosto who was born in 1921 in Cleveland was as follows. In 1928 Joseph Agosto applied for a United States passport; at the time of application, Joseph Agosto was living in Cleveland, Ohio, with his mother Carmelo Todaro Agosto and his father Arcangelo Agosto (R. 401–404). In 1944 Joseph Agosto applied in Palermo, Italy, for registration as a United States citizen (R. 394–400). A United States passport was issued on March 20, 1947 to Joseph Agosto (R. 407–408) but in September 1948 a certificate was executed in Palermo that Joseph Agosto had lost his American citizenship. A death certificate showed that Joseph Agosto died in December 1951 in Licata, Italy (R. 389–393).

In 1928, when Joseph Agosto applied for a passport in Cleveland, petitioner was residing in Italy and was called Vincenzo Di Paola. In 1944, when Joseph Agosto sought registration, and in 1947, when Joseph Agosto received a passport, petitioner was using the name Vincenzo Pianetti. By his own admission petitioner did not begin using the name Agosto until he arrived in the United States. The Service also introduced an affidavit of Mary Agosto; she stated that she was the sister of the Joseph Agosto who was born in Cleveland in 1921, and that petitioner was falsely using the identity of her deceased brother (R. 387–

254-059—78——2

388).[4] The 1947 passport issued to Joseph Agosto contained a picture and signature of Joseph Agosto; the picture and signature bore no resemblance to the picture and signature of petitioner submitted with petitioner's 1956 application for a passport (A. 34).

Finally, independent evidence established that the copy of the 1921 birth certificate on which petitioner had been relying could not have been sent to Italy between 1948 and 1950, as petitioner maintained (R. 94), because it was not issued until December 24, 1951 (A. 35). The copy of the birth certificate was issued, in other words, shortly after the death of Joseph Agosto in Licata, and after petitioner had left Italy—allegedly with the birth certificate in his possession and seeking to "clear up this mess of my birth" (S.R. 68).

d. The immigration judge issued his opinion on April 19, 1968 (A. 7-18). He found that petitioner's story was a fabrication. The judge concluded (A. 16) that:

> Although he has had ample opportunity, [petitioner] has presented no credible evidence that he is the Joseph Agosto born in Cleveland, Ohio in 1921. * * *
>
> * * * It is inconceivable that [petitioner] could concede that he was the Vincenzo Pianetti to whom all these records relate and still claim

[4] The record contained two other affidavits. Anna Vices Vinci submitted an affidavit identifying petitioner as Vincenzo Pianetti, her husband, born in Agrigento in July 1927 (R. 380). Crocetta Pianetti, petitioner's daughter, identified a photograph of petitioner as that of Vincenzo Pianetti (R. 381).

> that he is also the Joseph Agosto who was born in Cleveland, Ohio. The records presented here with respect to the lives of the two establish that they could not be one and the same person. Agosto was seven years older than [petitioner]. There is no record of his having married or having had children.

The immigration judge concluded that petitioner should be deported (A. 17-18).

2. Petitioner appealed to the Board of Immigration Appeals. The Board remanded the case to permit the immigration judge to consider petitioner's contention that he was entitled to relief under the "forgiveness" provisions of Section 241(f) of the Immigration and Nationality Act, 66 Stat. 204, as amended, 8 U.S.C. 1251(f) (see A. 19-20).

At the second hearing the immigration judge found petitioner to be deportable not only because he had entered the United States without inspection as an alien but also because he had been convicted of crimes of moral turpitude.[5] On Decemer 4, 1969, the judge

[5] Petitioner was convicted of the federal crime of wilfully making a false statement in connection with an application for a loan from the Federal Housing Administration; he misrepresented the amount of equity interest in the property that would serve as the security for the loan (A. 46; R. 467-471). Petitioner asked for leniency at sentencing, telling the judge that this was his first conviction (R. 525-526). He was placed on probation, which was revoked because petitioner violated its terms (A. 46).

Petitioner's representation to the United States court at sentencing was false. On August 23, 1949, he was convicted in Triponi, Italy, of fraud, and he was sentenced to five years' imprisonment, which was suspended. An Italian appellate court, on affirming the conviction, described the crime as aggravated swindling

found petitioner not entitled to "forgiveness" and again ordered him deported (S.R. 677–691).

3. Petitioner again appealed to the Board of Immigration Appeals, maintaining that he was born in Cleveland in 1921. He conceded that another Joseph Agosto had died in Licata in 1951 but argued (S.R. 659–664) that there were two Joseph Agostos, both of them sons of Arcangelo Agosto and both born in Cleveland. He was one of the two Joseph Agostos, and was born to Angela Porrello, who was Arcangelo Agosto's mistress. Petitioner contended that Porrello recorded petitioner's birth posing as Carmela Todaro, Arcangelo Agosto's wife. He also argued that the birth of the legitimate Joseph Agosto to the real Carmela Todaro had never been recorded. This, he said, explained the fact that there was only one birth certificate for a Joseph or Giuseppe Agosto.

The Board again declined to reach the merits of the case. It remanded for a second consideration of "forgiveness' relief under Section 241(f).

4. A hearing was held in 1971 on the second remand. This time petitioner produced three witnesses who testified in support of his claim of citizenship. Mr.

(A. 47). Petitioner avoided supervision under this sentence when he left Italy in 1950. Petitioner also was convicted on November 8, 1947, at Palermo, of forgery and fraud. The appellate court affirmed, describing this crime as "repeated forgery" and "usurpation of public functions" (A. 47). Petitioner served a prison sentence for this crime. His sentences for other crimes, apparently misdemeanors, were covered by an amnesty (A. 48–49). The immigration judge found that the Italian convictions were for crimes of moral turpitude.

and Mrs. Pianetti, who affiliated him in Italy in 1943, testified to a version of events that contradicted petitioner's earlier story in several critical respects.

a. Mr. Pianetti testified that petitioner was the son of Angela Porrello and Salvatore Agosto and had been born in Ohio in 1925 (S.R. 323–336). Mr. Pianetti said that he learned about petitioner's birth by reading Angela Porrello's letters to her sister, Mrs. Pianetti, and to her father, Angelo Porrello.[6] Mr. Pianetti testified that he first saw petitioner in June 1927, when he went to Palermo to pick up the boy (S.R. 446); petitioner was traveling with family friends from Ohio, whose identity Mr. Pianetti could not recall (S.R. 330, 332). According to Mr. Pianetti, petitioner was no more than two and one half years old when he arrived in Italy (S.R. 330, 332).[7] Mr. Pianetti testified that he and his wife immediately took petitioner into their home;[8] they initially lived with Angelo Porrello, petitioner's maternal grandfather, but they moved often with Pianetti's job transfers (S.R. 385, 553).[9]

[6] He also stated that none of these letters was now available, and he conceded that no document shows that petitioner was born in the United States (S.R. 346, 385).

[7] Petitioner testified that he recalled being four or five years old, and speaking English, on arrival in Italy (S.R. 53, 63, 105). Petitioner also had testified that he entered kindergarten in 1928 or 1929, at the age of six or seven (S.R. 49, 64).

[8] Mr. Pianetti testified that petitioner arrived in Italy in June 1927 (S.R. 446) and that the toddler was registered within four days of arrival (S.R. 454). Records show that the child was not registered until July 17 (S.R. 454).

[9] Petitioner had testified that he began living with the Pianettis only after his grandfather's death in 1930 (S.R. 106).

Mr. Pianetti denied that petitioner had ever lived in an orphanage (S.R. 333–334). The Italian records showing the contrary were wrong, Mr. Pianetti explained, because petitioner's grandfather, Angelo Porrello, registered petitioner with the Italian authorities under the name Di Paola to avoid having petitioner, an illegitimate son, registered as a Porrello or an Agosto (S.R. 334–336). He also stated that the 1927 birthdate in all the Italian records could have been a clerical error (S.R. 347–348). Mr. Pianetti did not state, however, that he had any personal knowledge that the records had been falsified, and indeed he testified that Angelo Porrello had never mentioned anything to him about the registration of petitioner at an orphanage (S.R. 333, 337, 348).

b. Mrs. Pianetti testified that her sister, Angela Porrello, wrote her approximately a year after she left Italy that petitioner had been born (S.R. 365). Angela Porrello emigrated to the United States in 1921, and Mrs. Pianetti's testimony therefore placed petitioner's birth in 1922 (S.R. 328–329, 455).[10] Mrs. Pianetti maintained, however, that petitioner was born in 1925 (S.R. 365).[11] Mrs. Pianetti denied any knowledge of how petitioner's Italian records came to show a 1927 birthdate (S.R. 373).

Mrs. Pianetti's testimony differed from petitioner's in several other respects. She testified that, when petitioner was 19 in 1944,[12] he was told that he was illegitimate and had been born in the United States (S.R. 380–381). Petitioner, however, testified that he learned of his United States origins only between 1948 and 1950, when Mr. Pianetti told him of his birth and he wrote to the uncle in Kansas City, who sent him the 1921 birth cirtificate (see S.R. 94–96). Mrs. Pianetti stated that petitioner started school at age six in 1933 or 1934 (S.R. 384)—this would have placed petitioner's birth in 1927 or 1928. Petitioner testified (S.R. 49, 64) that he began school at age six or seven in 1928 or 1929.

[10] Angela Porrello left a husband and two daughters in Italy when she emigrated in 1921 (S.R. 328–329).

[11] She also testified, at a later hearing, that petitioner was born in 1924 (S.R. 515).

c. Carmen Ripolino testified that petitioner was his half brother (S.R. 434, 439). Ripolino was born in Akron, Ohio, in September 1925, had lived there all his life (S.R. 419), and was the son of Angela Porrello and either Charles Litizia or Giacomo Ripellino (S.R. 420–422). He had a brother, Agosto Angelo Ripolino, born August 1, 1923, in Akron; this brother also was the son of Angela Porrello (S.R. 422–424). Ripolino said that his mother told him that he also had a half brother, whom his mother had sent to Italy; he assumed that the child had been sent to live with Angela Porrello's mother but did not know this to be true (S.R. 424, 431, 437). Ripolino thought that this half brother was older than he and younger than Agosto Angelo Ripolino (S.R. 443); if petitioner were the half-brother then, he would have been born in 1924 in Akron. Carmen Ripolino stated he did not know an Arcangelo Agosto in Akron or Cleveland (S.R. 431).

Ripolino had no personal knowledge that petitioner

[12] The Italian records showed that petitioner was 17 in 1944.

was the half brother who had been sent to Italy (S.R. 438); his mother never told him the half brother's name or where he had been sent. He testified only that he had been told by a "foster mother" that the Pianettis were petitioner's true parents and that he and petitioner therefore were first cousins (S.R. 434-436). Ripolino stated that he became aware that he and petitioner were half brothers only when petitioner called him several weeks before the hearing and told him of their relationship (S.R. 439, 442-443).

d. Petitioner testified during these hearings. He abandoned the versions of events that he had asserted previously and testified that he was born in the United States on August 30, 1924 (S.R. 530, 536, 547-548, 585). He said that he had no documents showing that he was born in the United States in 1924 (S.R. 550) and that he had not attempted to find a birth certificate showing his birth in 1924 (S.R. 551).[13]

---

[13] The record in this case contains two additional versions of petitioner's life history.

Petitioner executed an affidavit (R. 485-494) on June 3, 1968, during the pendency of the deportation proceedings, in connection with a friendly suit in the Superior Court for Pierce County in the State of Washington to declare Mary Marie Agosto his lawful wife. The affidavit stated that petitioner was seventeen at the time of his marriage to Anna Vicis Vinci in 1944 (A. 32-33). He relied on his birth in 1927 to show that he was too young in 1944 lawfully to marry Vinci (*ibid.*). Petitioner apparently told a similar story when he entered Canada in 1951; he told the immigration authorities there that he was 24 years old (placing his birth in 1927) and had been in Italy (see note 3, *supra*).

At the sentencing hearing on petitioner's conviction for falsification of papers in connection with the Federal Housing Administration loan, petitioner's counsel informed the judge that petitioner was "born in the United States, * * * grew up in the Midwest [and] [s]hortly before the Second World War he returned to

e. On April 11, 1973, the immigration judge filed an exhaustive opinion (A. 23-59) determining that all of petititoner's stories were fabrications. The immigration judge concluded that petitioner was born in Italy and is an alien. He found that petitioner, "since he was sixteen years of age, has a record of deceit, double dealing and subterfuge" (A. 32).

The immigration judge relied on the following facts in particular: (i) petitioner's stories are refuted by Italian documents that petitioner concedes pertain to him; (ii) petitioner's reliance on the 1921 birth certificate was convincingly overcome and effectively abandoned; (iii) petitioner's witnesses gave testimony that was internally contradictory and that contradicted petitioner's own testimony; the testimony of the witnesses, moreover, was in important respects not based on personal knowledge; (iv) petitioner lied in connection with his suit in Washington to legitimate his third marriage (see note 13, *supra*); and (v) petitioner has a long record of deceit and double-dealing (see note 5, *supra*).

The immigration judge discounted the testimony of the Pianettis because it was vague, because it was contradicted by contemporaneous records, and because they did not come forward with their stories until five years after the deportation proceedings began. The immigration judge discounted the testimony of

---

Italy * * * [where he] became an agent for the C.I.D. in Italy" (R. 524). Petitioner did not contradict this version of events, which was presented (along with the assertion that he was a first offender; see note 5, *supra*), in an effort to obtain a lenient sentence.

Carmen Ripolino because "all he knows about the identity of Joseph Agosto is what [petitioner] told him. He admitted this on cross-examination" (A. 39).

Finally, the immigration judge concluded that petitioner was not entitled to relief from deportation (A. 51–58), both because he entered the United States by fraud and because he had been convicted of offenses involving fraud.

5. The Board of Immigration Appeals affirmed the order of deportation (Pet. App. iv–xiii). It observed that the case for deportation rested principally on the Italian records made independently of each other and contemporaneously with petitioner's birth. All of the records showed petitioner to have been newborn in July 1927. Under any of petitioner's stories, he had been born no later than 1925, and the Board thought that the stories were facially incredible because the Italian "records appear * * * to have involved persons who would have been able to determine whether they were dealing with a newborn infant or with a child of 2 or 3 years" (*id.* at v).

The Board stated (Pet. App. viii) that the testimony of the Pianettis and Carmen Ripolino, if believed, would have contradicted the documentary evidence that petitioner was born in Italy. The Board thought, however, that it was impossible to credit the testimony. It also concluded that, even if the Pianetti and Ripolino testimony were believed, it still would be clear that petitioner is an alien because their story, even taken at face value, cannot be correct (*id.* at viii–

ix).[14] The Board held that the "clear, convincing, and unequivocal" evidence showed that petitioner is an alien (*id.* at xi), that he is deportable, and that he is not entitled to discretionary relief from deportation (*id.* at xi-xiii).

6. The court of appeals affirmed the deportation order (Pet. App. i-ii). It held that "[t]he evidence presented to the immigration judge does not disclose a colorable claim to United States nationality" (*id.* at ii) and that petitioner therefore was not entitled to a

[14] The Board stated (Pet. App. ix): "in order for us to accept [petitioner's] version of his birth, as presented by the witnesses he produced and as indicated by the other evidence of record, we would be required to find: (1) that the respondent's natural father was Salvatore Agosto (Tr. pp. 305, 340); (2) that Salvatore Agosto fathered a child born in 1921 in Cleveland, Ohio, whose name was Joseph, or Giuseppe, Agosto (Exs. 2 & 3), but that this child was *not* the respondent; (3) that the respondent's mother gave birth to a son in Akron, Ohio, in August of 1923 (Tr. p. 392), and that the father of this child was Giacomo Ripolino and not the father of the respondent (Tr. p. 395); (4) that the respondent's mother next gave birth to the respondent in August of 1924, one year later, in Cleveland, Ohio (Tr. p. 514); (5) that she knew the father of the respondent to be Salvatore Agosto (see Tr. 305, 340) and named the respondent Joseph or Joe Agosto, the same name that was given to an earlier child of the respondent's father (Tr. p. 482); (6) that the respondent's mother again began living in the same household as Giacomo Ripolino, and gave birth to a third son in Akron, Ohio, another year later in September of 1925 (Exs. 60 & 61; Tr. p. 399); (7) that the respondent's mother had him baptized in the United States (Tr. pp. 355–57); (8) that the respondent, who can afford to send an investigator to Italy to search records (Tr. pp. 425–26), has not yet been able to produce a certificate of his United States baptism, even though he ostensibly knows the name under which he would have been baptized and the general vicinity of Ohio in which the baptism likely would have occurred."

trial *de novo* in the district court concerning the question of his citizenship.[15]

Judge Hufstedler dissented (Pet. App ii). She explained that as a factfinder she would not have accepted petitioner's versions of events, but she concluded that the case presented questions of credibility that should be resolved by the district court in a trial *de novo*.

SUMMARY OF ARGUMENT

Section 106(a)(5) of the Immigration and Nationality Act is part of a general revision of the statutory provisions for judicial review of deportation orders. The revision, as a whole, was designed to prevent repetitious litigation of frivolous claims by eliminating in most instances any review by district courts of deportation decisions. Section 106(a)(5) is a narrow exception to the usual rule. It requires referral to the district court for trial when a person raises substantial issues of fact concerning his citizenship. A person must clear two hurdles to obtain a trial *de novo* in the district court: he must show that his claim of United States citizenship is not frivolous, and he must show that resolution of that claim turns on "a genuine issue of material fact."

[15] Although petitioner had abandoned before the immigration judge the claim that he had been born in 1921 in Cleveland, his opening brief in the court of appeals relied on the 1921 birth certificate and reiterated the story that petitioner had given at the first hearing, that he was born in Cleveland in 1921 (Br. 5–6). A supplemental opening brief for petitioner (Supp. Br. 5–6) continued to rely on the 1921 birth certificate but also stated that petitioner was born in 1924.

The requirement that a genuine issue of material fact must be at issue is quite similar to the standard under which courts grant summary judgment and direct verdicts. A court may withdraw a case from the factfinder when the tendered evidence is too incredible to be accepted by reasonable minds. Indeed, this Court has stated that a factfinder may not accept testimony that "carries its own death wound." *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 660. Petitioner's arguments are too incredible to be accepted by reasonable minds, and his evidence carries its own death wounds.

Documentary evidence, which petitioner concedes relates to him, shows that he was born in Italy in 1927, married and had children in Italy, acquired a criminal record in Italy, and then emigrated to Canada in 1951. The documentary evidence includes three independent records of his birth in 1927 in Agrigento, Italy, showing him to be only a few days old at the time the records were made; these records were each made by persons who were in a position to know whether they were dealing with a newborn infant. No documents show that petitioner was born in the United States or traveled from the United States to Italy as a child or youth. The absence of documents that could have demonstrated petitioner's birth in the United States is conspicuous and unexplained.

Against this documentary record, petitioner offered at least five conflicting stories of his origins and youth. When one story was discredited, petitioner substituted another. The conflicts among and within the stories

remain unexplained, and these conflicts involve many matters that should have been within petitioner's knowledge. Taken together, these twists and turns lead inevitably to the conclusion that petitioner's tales are fabrications.

Indeed, petitioner's stories could not survive a motion for summary judgment if the case were referred to the district court. And if the district court entered judgment for petitioner, the decision would be reversed on appeal as clearly erroneous. The conclusion that petitioner has presented no colorable claim of United States citizenship has been concurred in by three tribunals, and it is entitled to substantial deference by this Court. The purpose of Section 106(a)(5) does not extend to providing a trial *de novo* for petitioner's fanciful claims, and the court of appeals was entitled finally to reject his contentions.

ARGUMENT

PETITIONER HAS NOT PRESENTED A DISPUTED ISSUE OF MATERIAL FACT REQUIRING A TRIAL DE NOVO

A. THE COURT OF APPEALS MAY FINALLY RESOLVE FRIVOLOUS CLAIMS OF CITIZENSHIP

Section 106(a)(5) of the Immigration and Nationality Act is part of a thorough revision of deportation procedures enacted in 1961. The revision, as a whole, was designed "to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, 224. "The key feature of the congressional plan directed at this problem [of repetitious litigation of frivolous claims in order to obtain delay] was the elimination of the previous initial step in obtaining judicial review—a suit in the district court—and the resulting restriction of review to Courts of Appeals" (*id.* at 225).

Section 106(a)(5) creates a narrow exception to the statutory rule that deportation decisions are reviewed on the record of the administrative proceedings. It provides that when a person "claims to be a national of the United States and makes a showing that his claim is not frivolous," and when, in addition, "a genuine issue of material fact as to the petitioner's nationality is presented," the court of appeals shall transfer the case to the district court for a trial *de novo* of the nationality claim. Congress apparently intended this exception to satisfy the constitutional requirement that no person who makes a "substantial" claim of citizenship may be deported without judicial scrutiny. *Kessler* v. *Strecker,* 307 U.S. 22, 35 (dictum); *United States ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149; *Ng Fung Ho* v. *White,* 259 U.S. 276. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 26–29 (1961).

Both the language of the statute and its legislative history demonstrate that no person has an automatic entitlement to a *de novo* hearing. A person seeking such a hearing must clear two hurdles. First, he must demonstrate that his claim of citizenship is not "friv-

olous," for the courts of appeals may finally resolve frivolous claims. Second, he must demonstrate that the resolution of his claim of citizenship turns on "a genuine issue of material fact". Congress was concerned that referral to the district court not be automatic, because routine referral for trial would recreate the substantial delays that the 1961 legislation was intended to eliminate, and would reward dissembling aliens with several additional years of residence in this country. Under the statute the case must be transferred to the district court only when "a substantial claim of U.S. nationality" or "a genuine claim of nationality" creates factual issues. H.R. Rep. No. 1086, *supra,* at 26–29.

The statutory standard—the existence of "a genuine issue of material fact" concerning a non-frivolous claim of citizenship—is quite similar to the standard under which district courts may grant summary judgment before trial or take a case away from a jury after trial. Under the accepted principles for granting summary judgments and directed verdicts, a court may withdraw a case from the factfinder when the "tendered evidence is in its nature too incredible to be accepted by reasonable minds." *Whitaker* v. *Coleman,* 115 F. 2d 305, 306 (C.A. 5).[16] Indeed, this Court has stated that a factfinder *cannot* accept testimony that "carries its own death wound" (*National Labor Re-*

[16] This standard has been adopted by many courts. See, *e.g.*, *Miller* v. *Miller*, 122 F. 2d 209, 212 (C.A.D.C.); *Camerlin* v. *New York Central R.R.*, 199 F. 2d 698 (C.A. 1).

lations Board v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 660), even though the factfinder may be impressed by the witness's demeanor. For the reasons explained below, we submit that petitioners' stories are "too incredible to be accepted by reasonable minds" and "carr[y] their own death wounds." Petitioner's claim of citizenship is frivolous, and under Section 106(a)(5) the court of appeals was entitled finally to reject his contentions.[17]

B. PETITIONER'S INCONSISTENT AND UNDOCUMENTED STORIES DO NOT PRESENT A COLORABLE CLAIM OF CITIZENSHIP

Documentary evidence, which petitioner concedes pertains to him, shows that he was born in Italy in 1927, raised by an Italian couple, affiliated by the couple in 1943, married in Italy in 1944, convicted in Italy of several crimes, emigrated to Canada under the name Vincenzo Pianetti in November 1951, and

[17] Petitioner relies (Br. 11–12, 15–18) on a number of appellate cases that, he says, require a trial *de novo* of any claim of citizenship, however improbable the claim may be. The cases do not support that principle. For example, *Pignatello* v. *Attorney General*, 350 F. 2d 719 (C.A. 2), held only that Pignatello's claim was not frivolous, and it did not adopt any legal standard for the determination of frivolity, or for the determination of the existence of a disputed issue of material fact, other than the ones we discuss in the text. Other cases hold that there is no need for a trial *de novo* when a claim of citizenship is incredible on its face. See, *e.g.*, *Rassano* v. *Immigration and Naturalization Service*, 377 F. 2d 971 (C.A. 7) (claim based on undocumented testimony of relatives is not credible; no need for trial *de novo*); *Maroon* v. *Immigration and Naturalization Service*, 364 F. 2d 982 (C.A. 8) (an undocumented claim of birth in the United States does not require a trial *de novo*).

finally traveled to the United States.[18] No document shows that petitioner was born in the United States or traveled from the United States to Italy in his youth.

The documentary evidence is overwhelming. Petitioner, on the other hand, has offered at least five conflicting stories of his origin and youth.

The first story was offered to a United States court at sentencing in 1967. Petitioner contended that he was born in the United States and did not move to Italy until the late 1930s. He also told the court that he had never before been convicted of a crime, although he knew that to be false.

The second story was offered to the Immigration and Naturalization Service in 1968. Petitioner told the Service that he was born in Cleveland in 1921 to a particular couple, traveled to Italy in 1925, attended

[18] The evidence summarized here is in the administrative record, which we recount in greater detail at pages 3-14, *supra*. Petitioner does not contend that the administrative hearings were inadequate to allow him to present his evidence, and he does not contend that he would present to the district court any evidence that is not already in the administrative record. He seems to argue, however, that the administrative record should not be considered because the Board of Immigration Appeals did not recite all of it (Br. 19-20). But Section 106(a)(5) provides that the court of appeals shall decide the case on "the pleadings and affidavits filed by the parties," not on the basis of the opinion of the Board. In this case the entire administrative record was filed with the court of appeals; petitioner liberally referred to it in his briefs in that court. The record should be considered here as well. If a petitioner may refer to evidence outside the Board's opinion to show that he has made a substantial claim of citizenship, then it is appropriate to refer to the record to show that a claim is insubstantial.

kindergarten in 1928 or 1929, stayed with the Porrellos until 1930, stayed with the Pianettis thereafter, and did not learn of his United States origins until Mr. Pianetti told him of them in 1948, 1949, or 1950. He then promptly obtained a birth certificate showing that Giuseppe Agosto was born in Cleveland in 1921 and set off in search of his roots, arriving in Canada in 1950.

The third story was offered to the Immigration and Naturalization Service after it became clear that the second story would not serve. Documentary evidence showed that the Giuseppe (Joseph) Agosto born in Cleveland in 1921 was not petitioner. The real Joseph Agosto traveled to Italy and died in Licata (petitioner's home town) in December 1951. The birth certificate that petitioner claimed was his own, and in his possession no later than 1950, was not even issued until December 1951—after petitioner's arrival in Canada. In response to this convincing proof, petitioner maintained that two Joseph Agostos were born in 1921, sons of the same father but by different women. His mother, petitioner said, was his father's mistress but posed as his wife to register petitioner's birth. Petitioner never explained why wife and mistress would have given the same name to sons of the same father or why there was only one birth certificate for a Giuseppe or Joseph Agosto born in Cleveland.

The fourth story was told to a Washington court in 1968. He told that court that he had been born in 1927, so that when he married in Italy in 1944 he was under the legal age. This made his marriage void, he

said, leaving him free to marry again.[19] This is similar to a story petitioner told in 1951, when he represented to Canadian officials that he was born in 1927 in Italy (see note 3, *supra*).

The fifth story was offered by petitioner and three witnesses at the third hearing before an immigration judge. Petitioner abandoned all of his other theories [20] and contended that he had been born in 1924 as the illegitimate son of the same man who was the father of the Giuseppe Agosto born in Cleveland in 1921. He arrived in Italy in 1927, he said, and immediately joined the Pianetti family. He placed his birth in 1924 because, according to the testimony of one witness, his older and younger half-brothers were born in Akron, Ohio, in 1923 and 1925. But the Pianettis, the Italian couple who affiliated him, told different stories, placing his birth between 1922 and 1925. The three witnesses contradicted themselves, contradicted each other, and contradicted petitioner in important respects. None of the witnesses claimed personal knowledge of most of

[19] Petitioner also stated in an application for a marriage license in 1953 in Alaska that he had never been married previously.

[20] The claim that the 1921 birth certificate pertained to petitioner was well on the way to being abandoned when petitioner admitted that he did not go to the United States Consulate in Palermo in 1951 to obtain a passport as Joseph Agosto because he believed that Joseph Agosto had at one time lost his United States nationality (S.R. 68). Instead he chose to go to Canada as "Vincent Pianetti" on an Italian passport and then attempted to enter the United States from Mexico using only the 1921 birth certificate. He told the Canadian officials that he was born in 1927 in Italy (see note 3, *supra*). If petitioner really had believed that the birth certificate, of which he allegedly knew at the time, pertained to him, he could have obtained a United States passport in Italy and traveled with it.

the important points of the story; petitioner did not produce a birth certificate for *any* Agosto born in Akron or Cleveland between 1922 and 1925. Mrs. Pianetti testified that petitioner was told of his origins in 1944 (four to six years before petitioner testified that he learned of them, for the first time, from Mr. Pianetti).

The conflicts within and between petitioner's stories remain unexplained. A number of these inconsistencies concerned facts that should have been within petitioner's knowledge. It is unlikely that a person would err by five years in setting the date he began school, particularly when he does not claim any breaks in schooling of uncertain duration; yet such a discrepancy appears in the record (compare S.R. 49, 64 with S.R. 384). It also is unlikely that a child would not remember with whom he lived until the age of five (or nine, depending on the birth date used), but the record shows just such a lapse in petitioner's memory (compare S.R. 50, 105, 106, with S.R. 385, 553). Finally, it is incredible that a person would not be able to date with precision the year in which he, as a young man, was told he was illegitimate and began a search for his American identity, but the record shows that petitioner could not do so within four to six years (compare S.R. 95–96 with S.R. 380).

Mrs. Pianetti's testimony concerning petitioner's birthdate provided several distinct birthdates, yet she, above all other people, should have known the details of his life. Mr. Pianetti's testimony concerning the details of petitioner's registration in Italy was in-

ternally contradictory. The Pianettis' testimony about petitioner's early life was not so detailed that the wealth of detail alone would suggest that the story was true. Indeed, the Pianettis denied having any mementos of any sort of petitioner's youth (S.R. 346, 385).[21]

Petitioner admits that he made no effort to find a birth certificate showing his birth in 1924 or 1925, the critical dates under the theory that he now espouses. Although the Pianettis testified that petitioner was baptized at birth by his mother in Ohio (S.R. 387-388), petitioner has produced no evidence

[21] Petitioner makes much (Br. 4, 13) of the Pianettis' testimony that the records of petitioner's birth were falsified. Mrs. Pianetti, however, denied any knowledge of how petitioner came to be registered as born in 1927 (S.R. 372), and Mr. Pianetti claimed no personal knowledge of their falsification; he advanced only the hypothesis that the dates on three separately-made records might have been clerical errors (S.R. 347-348).

Petitioner also contends (Br. 4) that a lawyer sent by him to Italy to examine the records found unspecified irregularities. The lawyer, however, knew almost no Italian (S.R. 458), and he was not conversant with Italian law or recordation procedures—and certainly not with procedures in Agrigento in the 1920s. He did not see all of the relevant records; he went to the capitol building (S.R. 460) and not to the orphanage (S.R. 491-493). For example, he did not find the records of baptism (S.R. 469, 491) that were introduced in the record by the government, and so his testimony concerning "gaps" in the record is worthless.

Finally, petitioner contends (Br. 13) that "a good part of [the Pianettis'] testimony was corroborated by Carmen Ripolino." But Ripolino was unable to confirm that the child sent by his mother somewhere in Italy at an unspecified date was petitioner, and the accuracy of his recollection should be considered in light of his admission that petitioner provided him with the "knowledge" about which he testified.

of a baptismal record or evidence that such a record has been lost.[22] No travel document authorized petitioner's alleged trip from the United States to Italy in 1927. Petitioner did not present any witnesses who had an independent recollection of his birth and youth in Ohio, nor did he explain why none was available.

It is fair to say, in sum, that petitioner's claim of citizenship is preposterous. Italian records place his birth there in 1927. Petitioner, whose varying stories place his birth in Ohio between 1921 and 1925, cannot explain how three independently made records could identify him as one or two days old in July 1927, except to say that the dates on them may be clerical errors or to make bare allegations that they were falsified. Petitioner has changed stories over and over. He told one story to a federal court and another to the immigration judge. While telling that story to the immigration judge he told a third to a state court. He told still another story when the second collapsed, and then he abandoned all of his stories in favor of a fifth version. His stories contradict each other, and his witnesses contradict themselves. After 10 years of hearings, the only documentary evidence petitioner has introduced is the birth certificate of a man who died in Italy in 1951.

[22] It is not necessary to determine whether the Pianettis were deliberately untruthful, because petitioner's story as a whole clearly does not raise any colorable claim of citizenship. An untruth obvious from the face of the record does not raise either an issue of credibility (cf. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 470-472) or a genuine issue of fact.

These tales carry their own death wounds. Petitioner's version of events could not survive a motion for summary judgment in the district court; if the court heard evidence, petitioner's case could not survive a motion for a directed verdict. If the district court were to enter judgment in petitioner's favor, it would be reversed as clearly erroneous.[23]

The immigration judge, the Board of Immigration Appeals, and the court of appeals found that petitioner had not presented even a colorable claim of citizenship.[24] That decision, concurred in by three separate tribunals, is entitled to substantial deference in this Court. Cf. *Berenyi* v. *Immigration Director,* 385 U.S. 630. It is extraordinarily implausible that a fourth tribunal could come to a different conclusion, and there is, therefore, no need for a trial *de novo.* The court of appeals provided petitioner with judicial

---

[23] The "clearly erroneous" standard (Fed. R. Civ. 52(a); and see *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 394–395) would apply on appeal from a decision in petitioner's favor because Section 106(a)(5) provides that litigation on a trial *de novo* shall be conducted as if it were under 28 U.S.C. 2201, the Declaratory Judgment Act. *Cf.* 2 Gordon and Rosenfield, *Immigration Law and Procedure* § 8.30c at n. 33.

[24] Petitioner contends (Br. 15–18) that the court of appeals overstepped its authority by evaluating the credibility of his witnesses and rejecting their testimony. But the court did not purport to decide the witnesses' credibility; it held only that petitioner never made out a "colorable claim" (Pet. App. ii) of United States citizenship. Petitioner's arguments can be rejected without resort to demeanor evidence or the other forms of observation that would be available only on a *de novo* hearing. The court of appeals found simply that a factfinder could not accept petitioner's version of events.

review of his claim of citizenship and found it wanting. If petitioner's fanciful tales are enough to obtain a trial *de novo,* then any person claiming to be a citizen may obtain such a trial. That is not the purpose for which Section 106(a)(5) was designed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Deputy Solicitor General.
MARION L. JETTON,
Assistant to the Solicitor General.
ROBERT J. ERICKSON,
JOHN H. BURNES, JR.,
Attorneys.

JANUARY 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978